NO. 90-1261

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

FRED QUAVE
Petitioner

versus

PROGRESS MARINE,
DOLPHIN TITAN INTERNATIONAL, INC.,
AMERICAN HOME ASSURANCE COMPANY,
c/o American International Adjusting Company
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Federal Rules of Civil Procedure (6(a)) apply to a 33 U.S.C. Sec. 914 (f) (LSHWA) penalty?

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OPINIONS BELOW

On December 2, 1987, a decision and order of the Honorable Parlen L. McKenna, Administrative Law Judge, was filed in the office of the Deputy Commissioner and furnished to all parties, ordering the payment of compensation benefits to the claimant, Fred Quave, and appears as App. A, infra, p.p. A__-__. By supplemental Compensation Order dated March 22, 1989, the Deputy Commissioner found the employer/carrier in default in the amount of $7,065.49 for past due benefits. Additionally, the employer/carrier was ordered to pay a 20% penalty based upon the total amount of compensation owed in the amount of $19,413.59 plus interest in the amount of $11,293.63 and appears as App. B, infra, p.p. A__-A__. On May 5, 1989, Fred Quave filed an "Application for Entry of Judgment Pursuant to the United States Code 33 Section 918" seeking to enforce a "Supplemental Compensation Order Declaring Default" issued by the Deputy Commissioner Donnette S. Glenn on March 22, 1989. Progress Marine, Inc. and American Home Assurance Company c/o American International filed a Motion to Dismiss Plaintiff's Application for Entry of Judgment. Said motion was granted with written reasons in a Minute Entry of September 8, 1989 and Judgment signed September 11, 1989 and appears as App. C, infra, p.p.A__-A__. A motion for New Trial was filed and the District Court amended its previous Judgment and awarded Fred Quave interest for the period December 2, 1977 through December 14, 1987 on temporary total benefits and interest from September 5, 1978 to December 14, 1987 on permanent partial benefits. The Amended Judgment was signed October 26, 1989 and appears as App. D, infra, p.p. A__-A__.

Appeals were filed by both parties to the United States Court of Appeals, Fifth Circuit which affirmed the

District Court and which opinion is reported at 912 F.2d 798 (5th Cir., 1990) which appears as App. E, infra at p.p. A__-A__. The employer/carrier filed a Petition for Rehearing which opinion appears at _____ F.2d _____ (5th Cir., 1990) and appears as App. F, infra, at p.p. A__-A__. Thereafter, claimant, Fred Quave, filed a Petition for Rehearing which was denied on December 13, 1990 and a Petition for Rehearing En Banc which was denied on December 13, 1990.

JURISDICTION

The jurisdiction of the District Court was pursuant to 28 U.S.C. Section 1991. The jurisdiction of the Court this invoked pursuant to 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

1. Fred Quave has a claim pending with the Department of Labor under the Longshoremen and Harbor Workers' Act against his employer Progress Marine and its insurer, American Home Assurance Company c/o American International Adjusting Company, OWCP No. 7-38334 and Case No. 81 LHC-876.

2. On December 2, 1987, a decision and order of the Honorable Parlen L. McKenna, Administrative Law Judge, was filed in the office of the Duputy Commissioner and furnished to all parties, ordering the payment of compensation benefits to the claimant, Fred Quave. The order stated as follows:

A. Employer/Carrier shall pay to Claimant compensation for temporary total disability commencing December 16, 1974, through January 13, 1976 and commencing

September 22, 1977 through December 1, 1977 based on an average weekly wage of $397.48, such compensation to be computed in accordance with Section 8(b) of the Act.

B. Employer/Carrier shall pay to the Claimant compensation for permanent partial disability in accordance with Section 8(c) (21) of the Act, based upon 66-2/3% of the difference between Claimant's average weekly wages of $397.48 at the time of injury and his post-injury wage earning capacity of $106.00 per week commencing September 5, 1978, and continuing thereafter, excluding the period from September 22, 1977 until December 1, 1977, with the Claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage.

C. Employer/Carrier shall receive credit for all compensation previously paid to Claimant for his work related injury of November 24, 1975.

D. Employer/Carrier shall continue to furnish such reasonable and necessary medical care and treatment as the Claimant's work-related injury of November 24, 1975, may require.

E. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. Section 1961 on all past due benefits outstanding.

F. Claimant's attorney within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

3. Compensation in the amount of $90,002.47 was paid to the claimant on December 15, 1987, over ten days after the order of December 2, 1987, and claimant applied for a 20% penalty plus the difference due in past compensation benefits due pursuant to 33 U.S.C. § 914 (f).

4. The Deputy Commissioner referred the matter to the Administrative Law Judge for hearing on whether or not the 20% penalty was due. All of the **facts** applicable to the penalty issue were stipulated before the Administrative Law Judge and he remanded the issue back to the Deputy Commissioner.

5. By Supplemental Compensation Order dated March 22, 1989, the Deputy Commissioner found the employer/carrier in default in the amount of $7,065.49 for past due benefits. Additionally, the employer/carrier was ordered to pay a 20% penalty based upon the total amount of compensation owed in the amount of $19,413.59 plus interest in the amount of $11,293.63.

6. On May 5, 1989, Fred Quave filed an "Application for Entry of Judgment Pursuant to the United States Code 33 Section 918" seeking to enforce a "Supplemental Compensation Order Declaring Default" issued by the Deputy Commissioner Donnette S. Glenn on March 22, 198 . Progress Marine, Inc. and American Home Assurance Company c/o American International filed a Motion to Dismiss Plaintiff's Application for Entry of Judgment. Said motion was granted with written reasons in a Minute Entry of September 8, 1989 and Judgment signed September 11, 1989.

7. A Motion for New Trial was filed and the District Court amended its previous Judgment and awarded Fred Quave interest for the period December 2, 1977 through

December 14, 1987 on temporary total benefits and interest from September 5, 1978 to December 14, 1987 on permanent partial benefits. The Amended Judgment was signed October 26, 1989.

8. Claimant, Fred Quave, filed an appeal with the United States Court of Appeals Fifth Circuit contending that the Federal Rules of Civil Procedure did not apply to a 33 USC § 914 penalty under the LSHWA. Employer/Carrier filed cross appeals on the award of interest and attorneys fees. The Fifth Circuit in an opinion dated September 24, 1990 reported at 912 F.2d 798, (5th Cir. 1990) affirmed and held the Federal Rules of Civil Procedure do apply to 33 § 914 (f) penalties under the LSHWA and that claimant was entitled to interest. The Fifth Circuit refused to consider the appeal as to attorneys fees because it held the notice of appeal was insufficient.

9. Employer/Carrier filed a Petition for Rehearing which was granted on November 15, 1990 and the Fifth Circuit held the appeal as to attorney fees was sufficient and affirmed the District Court's award of attorneys fees.

10. Claimant, Fred Quave, filed a Petition for Rehearing and a Petition for Rehearing En Banc which were both denied on December 13, 1990.

STATEMENT OF FACTS

On December 2, 1987, a decision and order of the Honorable Parlen L. McKenna, Administrative Law Judge, was filed in the office of the Deputy Commissioner and furnished to all parties.

Fred Quave received a check for $90,002.47 on December 15, 1987, a Tuesday, thirteen days later.

ARGUMENT

On September 24, in *Quave v. Progress Marine*, 912 F.2d 798, 800 (5th Cir. 1990), the Fifth Circuit held that in determining the timeliness of payment under the ten-day rule of LHWCA 33 USC § 914 (f), the provision of Rule 6(a) of the Federal Rules of Civil Procedure that "[i]n computing any period of time prescribed or allowed by these rules

. . . [w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation," applies. The Rule effectively converts a specified ten-day period to fourteen (or even fifteen) calendar days. The Fifth Circuit therefore invalidated a supplementary order entered by the deputy commissioner in New Orleans, which declared the insurer in default of the twenty-percent additional compensation required by 33 USC § 914(f) when the payment under an ALJ's award was received on the thirteenth day after the filing of the award.

The Fifth Circuit relied on what it termed "the plain language of Fed. R. App. P. 81(a)(6)," which states that the Rules "apply to proceedings for enforcement or review of compensation orders under [LHWCA] Sections 18, 21, . . . except to the extent that matters of procedure are provided for in that Act." It pointed out that the Fifth Circuit had expressly left the question of application of Rule 6(a) to 33 USC § 914(f) open in *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1219 (5th Cir. 1985), though it had there pointed out both the terms of Rule 81(a)(6) and the fact that it had previously reasoned that what the deputy commissioner had labeled a "Section 914(f) Assessment" was in fact a supplementary compensation order declaring a default, under Sec. 18(a) (*Tidelands Marine Service v. Patterson*, 719 F.2d 126, 128 n.3 (5th Cir. 1983)). The Quave Court drew the conclusion the Lauzon Court had declined either

to accept or reject: that the "plain language" of Rule 81(a)(6) "coupl[ed] with this Court's reasoning in Tidelands" required application of Rule 6(a), so as to exclude non-business days from the ten-day period for payment without augmentation under 33 USC § 914(f).

The "plain language" of Rule 81(a)(6)is directly to the contrary. Rule 1 provides that the Rules "govern the procedure in the United States District Courts," and Rule 81(a)(6), applying the Rules to "proceedings for enforcement or review under Sections 18, 21," makes perfect sense in that context. Payment under 33 USC § 914(f) is not a proceeding in a district court, is not a matter of procedure, and is not a "proceedin[g] for enforcement or review of [a] compensation orde[r]," under Sections 18 or 21 otherwise.

Further, the Fifth Circuit's "reasoning" in Tidelands similarly negates rather than supports the application of Rule 6(a) to 33 USC §914(f). The Court there recognized that what the deputy commissioner had called a "Section 914 (f) Award" could not be that, because there is no such thing; the additional twenty percent called for by 33 USC § 914(f) falls due automatically and by operation of law, and the deputy commissioner's order merely declared it in default, pursuant to Sec. 18(a). Far from supporting the present panel's reasoning that the time for payment under 33 USC § 914(f) is defined by Rule 6(a), Tidelands demonstrates that there is no "proceeding" involved in 33 USC § 914(f) at all, so that the Rules could have no application even apart from their limitation to procedural steps in proceedings in the district courts.

Beyond even these conclusive considerations, the legislative history of the LHWCA Amendments of 1984 shows Congressional understanding of, and refusal to alter, the strict requirement of payment within ten calen-

dar days under 33 USC § 914(f). The bill in the Ninety-Seventh Congress that evolved into the 1984 Amendments enacted by the following Congress included a provision to amend 33 USC § 914(f) to extend its ten-day period to fifteen days (and require only mailing of payment within the time limit). S. 1182, 97th Cong., 1st Sess., Sec. 10(c), reprinted in 127 Cong. Rec. 9829, 9833 (May 14, 1981), and in LHWCA Amendments of 1981: Hearings Before the Subcomm. on Labor, Sen. Comm. on Labor & Human Resources, 97th Cong., 1st Sess.1, on S. 1182 at 10 (1981). Several witnesses at hearings on the bill supported the proposed change. They referred to "the absurdity of this ten day provision" (id. at 205), and described the proposed change as "reasonable and [in] conform[ity] to modern business practice and creat[ive of] no hardship to the injured employee" (id. at 273). They described "present law" as "requir[ing] actual delivery to the employee within 10 days of the due date," ibid., i.e., "of [the] filing [of the award] with the OWCP," id. at 893 (see also id. at 1144), and cited and described a specific reported decision in which an additional 20 percent had been held owed under the existing provision where payment had been received on the thirteenth calendar day (ibid.). Deputy Under Secretary Collyer, however, testified that the existing version "should be retained" (id. at 1201). The bill that emerged from committee after the hearings (Sen. Req. No. 97-498, 97th Cong., 2d Sess. (1982); 128 Cong. Rec. 18008, 18010 (July 27, 1982)) contained no change in 33 USC § 914(f), nor was any such change included in any version of S. 348, 98th Cong., which was eventually enacted as the 1984 Amendments.

Finally, the less-than-eleven-days provision of Rule 6(a) is the result of a 1985 amendment to the Rule, which previously excluded intervening non-business days only from periods less than seven days. As one would expect,

the explanatory Note of the Advisory Committee refers only to "motions under rules with 10-day periods," not to non-procedural actions required by statutes with ten-day periods. There is not the slightest indication that the change in the rule was intended to have the substantive effect the Fifth Circuit has given it by applying it to the time for payment under LHWCA Sec. 914(f). .pa

CONCLUSION

It is respectfully submitted that Federal Rule of Civil Procedure should not apply to a USC 33 § 914 (f) penalty under LSHWA for the reasons stated in the argument.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Behalf of Petitioner, Fred Quave, has been furnished to counsel of record on this the 6th day of February, 1991.

JOSEPH J. WEIGAND, JR.

APPENDIX A

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

In the Matter of	
FRED RAY QUAVE Claimant	
	Case No. 81-LHC-876N
v.	
	OWCP No. 7-38334
PROGRESS MARINE, INC. Employer	
and	
AMERICAN HOME INSURANCE CO. Carrier	

DECISION AND ORDER ON REMAND

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act), as extended to cover certain employees under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §1331 *et seq.*, and the governing regulations thereunder filed by Fred Ray Quave, Claimant, against Progress Marine, Inc., Employer and American Home Insurance Company, Carrier. A hearing was

originally held in this case on May 11, 1981 and May 29, 1981.[1] A Decision and Order was issued by the Administrative Law Judge on October 20, 1981, denying the claim on the ground that it was not timely filed. The Claimant appealed, and the Benefits Review Board issued a Decision and Order on February 25, 1986, finding that the claim was timely filed, remanding the case for further consideration.

STIPULATIONS

At the original hearing, the parties stipulated:

1. That the parties are subject to the Act;

2. That Claimant and Employer were in an employee/employer relationship at the time of the injury;

3. That Claimant was injured on November 24, 1975;

4. That Claimant was in the course and scope of his employment;

5. That compensation benefits were paid to Claimant for temporary total disability from December 16, 1975 to June 13, 1976 at a rate of $185.50 per week for a total of $768.50 to date of hearing.

ISSUES

The issues which remain unresolved:

1. Whether Claimant's disability is work-related.

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[1] In this decision "CX" and "RX" refer to Claimant's exhibits and Respondent's exhibits, respectively. "Tr." refers to the transcript of the hearing.

2. The nature and extent of Claimant's disability;

3. Date of maximum medical improvement;

4. Average weekly wage.

STATEMENT OF THE CASE

The Claimant was 50 years old at the time of the hearing and has a seventh grade education. He was injured on November 24, 1975, while working offshore as a crane operator and welder for Progress Marine, Inc. The injury occurred while the Claimant was welding on the cellar deck of a platform, 20 feet below the main deck. A co-worker located approximately 50 feet above the Claimant dropped a large board and it struck the Claimant in the lower back. The Claimant testified that he was in pain but he did not want to go to the doctor unless it was serious, so he completed the hitch. He went home for his regularly scheduled seven days off, then returned to work (Tr. 24). Toward the end of the hitch his leg began hurting, so the Claimant went to Dr. Newman on December 10, 1975. Dr. Newman took x-rays which showed an old compression fracture at L-1 which the Claimant had sustained after falling off of a roof in 1973. The fracture had healed and Dr. Newman found the remaining vertebral bodies intact and the disc spaces preserved throughout. Dr. Newman diagnosed a severe contusion of the right hip. He prescribed medication and physical therapy, and discharged the Claimant as cured January 12, 1976. The Claimant received compensation benefits from Progress Marine from December 16, 1975, until January 13, 1976, at which time he returned to his regular duties.

The claimant continued working for Progress Marine, Inc., throughout 1976 and 1977. He testified that

he continued to have pain in his back and leg, but that it was not serious enough to prevent him from working. Dr. Newman continued to refill the Claimant's prescription for pain medication. The Claimant testified that he began experiencing severe pain in his leg and hip in September 1977, so he went to Dr. Newman and Dr. Hebert. The Claimant stated that he notified the Employer's insurer before he went to the doctor, and was told that his compensation would be reinstated and his medical expenses would be paid. The Claimant testified that a few days later, however, he received a telephone call and was informed that his claim had prescribed and he would not be receiving compensation or payment of his medical bills (Tr. 103-104). The Claimant visited Dr. Newman on September 26 and October 3, 1977. Dr. Newman reported that the Claimant was experiencing pain in his right hip, and Dr. Newman related it to the Claimant's on-the-job injury in 1975. Dr. Newman prescribed medication which did not alleviate the Claimant's pain, so he referred the Claimant to Dr. Sinclair, an orthopedic surgeon. The Claimant testified that he saw Dr. Sinclair, but that Dr. Sinclair did not say whether there was anything wrong with him (Tr. 69).

The Claimant entered Tulane Medical Center on October 31, 1977. Lumbosacral spine x-rays revealed narrowing of the L3-4 interspace with slightly increased anterior osteophytic formation and mild spur formation at the other lumbar levels, as well as an old compression fracture of L-1. A lumbar myelogram revealed the healed fracture of L-1 with a slight impression on the spinal canal at the same level. An electromyogram yielded normal results. The physical examination revealed restriction of motion of the lumbar spine, soreness to palpation, and paraspinous muscle spasms. Dr. Correa diagnosed a chronic lumbosacral sprain and had the Claimant undergo physical therapy and use of a TENS unit. Dr. Correa reported that the Claimant

improved with conservative treatment. He prescribed medication for the Claimant and discharged him on November 12, 1977. The Claimant testified that he stayed home for a few weeks, then returned to work for Progress Marine. He was placed in a light duty position in which he earned the same hourly rate as he had before, but he worked less hours. The Claimant stated that he continued working for Progress Marine until he was laid off in 1978. The parties stipulated that September 5, 1978 was the date the Claimant last worked for Progress Marine (Tr. 112).[2] The Claimant testified that the only steady employment he had after that date was a welding position with C.M.I.C. Corp., where he worked for approximately nine months and earned approximately $10,000.

At the request of the Employer's insurer, the Claimant saw Dr. Williams, an orthopedic surgeon, on September 28, 1978. Dr. Williams reported that the Claimant complained of constant pain in the right hip area with diffuse stiffness and occasional weakening of the legs. The physical examination revealed no paraspinous muscle spasm or tenderness of the spinous processes. X-rays showed an old healed compression fracture of L-1, with small degenerative osteophytes at L-2 and L-3. Dr. Williams noted that the small paraspinous bones adjacent to the L-3, L-4 and L-5 transverse processes were suggestive of possible old avulsion fractures. Dr. Williams reported that there were no findings to explain the Claimant's symptoms. He was unable to recommend further treatment based on the clinical findings, and urged the Claimant to resume his activities.

At the recommendation of his attorney, the Claimant

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[2] The Claimant filed his compensation claim against Progress Marine on May 30, 1978.

saw Dr. Cenac, a board certified orthopedic surgeon, on May 21, 1980. The Claimant's complaints were continuous low back pain and right hip pain. The physical exam and x-rays revealed no neurological deficit in either lower extremity. There were objective findings of limitation of motion in the lower back, as well as muscle spasm and point tenderness over the paraspinous muscle masses in the right lower lumbar region, indicative of continued muscle irritability. The x-rays revealed a healed fracture at L-1 and non-healed transverse process fractures at L-2, L-3, L-4 and L-5 on the right (Tr.77). A bone scan revealed that there was no longer any active attempt on the body's part to unite the fractures. Dr. Cenac indicated his diagnosis as low back pain post-trauma residual from un-united transverse process fractures at L-2, L-3, L-4 and L-5 on the right (Tr. 77). Dr. Cenac stated that he reviewed an x-ray film series from 1973, when the Claimant sustained the fracture at L-1, and the fractures at L-2, L-3, L-4 and L-5 were not present at that time. They were present in the film series taken after Claimant's accident in 1975, however, so Dr. Cenac opined that the unhealed fractures were caused by the Claimant's work-related accident in 1975 (Tr. 77-78). Dr. Cenac indicated that the Claimant had reached maximum medical improvement several months after the accident in 1975, and that his muscles would never completely heal (Tr. 91). Dr. Cenac assigned the Claimant a disability rating of 10 percent impairment of the body as a whole. He stated that the Claimant should avoid heavy lifting greater than 75 to 100 pounds. He recommended no overhead manual labor or repetitive stooping or straining with weights. Dr. Cenac testified that he frequently performed pre-employment physicals. He stated that he would not pass the Claimant to work in a shipyard as a welder or to work offshore as a crane operator, but he stated that the claimant could return to work within the restrictions set forth (Tr. 83-84). Dr. Cenac last saw the Claimant on July

1, 1980.

DISCUSSION, FINDINGS AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law which follow are prepared upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Each exhibit entered, particularly those related to Claimant's medical condition, although perhaps not specifically mentioned in this decision, have been carefully reviewed and given thoughtful consideration.

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 454, 467, *reh. den.*, 391 U.S. 929 (1968). At the outset it further must be recognized that all factual doubts must be resolved in favor of the Claimant. *Wheatley v. Adler*, 407 F.2d 30 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir.), *cert. den.*, 395 U.S. 921 (1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of the Claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

The Claimant has the burden of establishing a *prima facie* case of compensability, namely, he must demonstrate a physical or mental impairment and prove some circumstances at work which could have caused the alleged

impairment. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336, 338 (1981); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, United States Department of Labor*, 455 U.S. 608, 616 (1982). Once Claimant establishes his *prima facie* case, Section 20(a) of the Act favors him with the presumption that the harm was caused by the accident. *Malaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

In the present case, the Claimant alleges that he sustained a work-related injury on November 24, 1975, which was the cause of the severe pain he experienced in September 1977 and continued to experience as of the date of the hearing. It has been held that the Claimant must show (1) that he sustained physical harm, and (2) that a work-related accident occurred, or working conditions existed which could have caused the harm. Once these two elements are established, a Claimant has established a *prima facie* case and is entitled to a presumption that the injury arose out of employment. *Kelaita v. Triple Machine Shop*, 13 BRBS 326 (12981) (leading Board case); *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). The Section 20(a) presumption does not aid the Claimant in establishing his *prima facie* case.

The Claimant established that he sustained physical harm from the work-related accident which occurred on November 24, 1975. He testified that he continued to experience pain in his lower back and hip area, as well as in his leg, even after he returned to work. The Claimant stated that he experienced the same type of pain in September 1977, but it was much more severe (Tr. 50). The Claimant also testified that he had not had any type of accident after his on-the-job accident in 1975. Additionally, based on the Claimant's history and his review of the x-ray films, Dr. Cenac related the Claimant's pain to his work-related injury of November 24, 1975. Therefore, I find that the Claimant has established a *prima facie*,case of compensability.

Once Claimant establishes his *prima facie* case, the Section 20(a) presumption operates to link the impairment and the injured employee's employment. *Darnell v. Bell Helicopter International, Inc.*, 16 BRBS 98,99 (1984). After the presumption has been established, the Employer has the burden of rebutting the presumption by substantial evidence to contrary, namely that the injury was not caused by the employment. *Brennan v. Bethlehem Steel Corp.*, 7 BRBS 947, 951 (1978). More specifically, in order to overcome the presumption of compensability, the evidence must be specific and comprehensive enough to sever the potential connection between the disability and the work environment. *Parsons Corp. v. Director, OWCP, United States Department of Labor*, 619 F.2d 38, 41 (9th Cir. 1980).

The Employer asserts that a sufficient amount of time elapsed between the date of the accident, November 24, 1975, and the time when the Claimant began experiencing additional pain in September 1977 to sever any possible connection between the 1975 injury and any subsequent disability the Claimant suffered from. The Employer offered no evidence, however, to indicate that the Claimant suffered any type of accident subsequent to November 24, 1975. Additionally, while the Employer maintains that Dr. Cenac has no way of determining whether the Claimant's symptoms in 1980 were caused by the November 1975 accident, Dr. Cenac testified that his opinion was based on the x-ray films he reviewed, as well as the Claimant's history. Therefore, I find that the Employer has not submitted sufficient evidence to rebut the Claimant's *prima facie* case. Accordingly, I find that the Claimant is entitled to compensation.

The nature and extent of Claimant's disability must next be determined. As envisioned under the Act, disability is an economic concept based upon a medical foundation.

Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968);l *Owens v. Traynor*, 274 F.Supp. 770 (D. Md. 1967), *aff'd* 396 F.2d 783 (4th Cir.). *cert. den.*, 393 U.S. 962 (1968). Thus, the degree of disability in any situation cannot be measured solely by the Claimant's physical or medical condition. Consideration must be given to Claimant's age, education, industrial history and the availability of work for the disabled Claimant. Claimant, however, has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Henigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978); *Ashey v. General Dynamics Corp.*, 16 BRBS (ALJ) 110 (1983).

Claimant's disability must be considered permanent in nature if it is continual, lasting and indefinite. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. den.*, 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed 2d 755 (1969); *General Dynamics v. Benefits Review Board*, 565 F.2d 208 (2nd Cir. 1977). A disability is permanent when the Claimant has attained maximum medical improvement. Maximum medical improvement may be found where a Claimant's condition only deteriorates after a physician rates it as stable. *Davenport v. Apex Decorating Co.*, 18 BRBS 194 (1986). The question of when Claimant has reached maximum medical improvement is primarily a question of fact. When making factual determinations, the Court has discretion to weigh the evidence, draw inferences from it, and reach conclusions it finds most reasonable. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). The Court's determination of the date upon which a Claimant attains maximum medical improvement will be upheld if reasonable. *Williams, supra*, 10 BRBS at 917-18.

In the instant case, Dr. Cenac testified that the Claimant reached maximum medical improvement several months after the accident on November 24, 1975. Additionally, Dr. Newman released the Claimant to return to

work on January 12, 1976. Therefore, since Dr. Cenac did not give a specific date, I find that the Claimant reached maximum medical improvement on January 12, 1976, at which time his condition became permanent.

The Employer concedes that the Claimant was temporarily totally disabled from December 16, 1975 until January 13, 1976, but asserts that once the Claimant's condition became permanent he no longer suffered from any disability. The Claimant alleges that he continues to suffer from a permanent partial disability. The Claimant's position is supported by Dr. Cenac's testimony that the Claimant reached maximum medical improvement shortly after the injury in November 1975, and thereafter suffered a 10 percent disability of the body as a whole. Dr. Cenac stated that the Claimant's condition was not totally disabling and would allow him to return to work within certain restrictions. Additionally, the parties stipulated at the hearing that the Claimant was capable of securing employment at minimum wage. Therefore, based on the medical evidence and the stipulations of the parties, I find the Claimant temporarily totally disabled from December 16, 1975 to January 13, 1976, at which time his disability became permanent and partial to date and continuing.

To determine the compensation benefits for temporary total disability, Section 8(b) of the Act provides:

> (b) Temporary total disability: In case of a disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

To calculate compensation benefits for a permanent partial disability which is not a scheduled injury, Section 8(c)(21) of the Act provides:

> . . .the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

In determining Claimant's average weekly wages, Section 10 of the Act provides a two-step process for calculation of average weekly wage: (1) Average annual earnings are computed under one of the first three subsections of Section 10 of the Act; and (2) this average annual earnings figure is then divided by 52 pursuant to Section 10(d) to arrive at an average weekly wage. 33 U.S.C. §910(a) - (d). For purposes of awarding compensation under the Act, Congress intended by this section to determine a claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978). Therefore, a Claimant's average weekly wage is to be determined as of the time of injury. *Hastings v. Earth Satellite Corp.*, 8 BRBS 519 (1978), *aff'd in pertinent part*, 628 F.2d 85, 14 BRBS 345 (D. C. Cir. 1980), *cert. den.*, 449 U.S. 905 (1980).

In the present case, the parties stipulated that the Claimant's annual earnings for the year preceding his injury were $19,874.28. The Claimant did not work the last two weeks of 1975 because of his injury. Therefore, dividing $19,874.28 by 50, I find the Claimant's average weekly wage to be $397.38.

The post-injury wage-earning capacity of a partially disabled Claimant is determined by his actual earnings if they fairly and reasonably represent his wage-earning capacity. In the instant case, the Claimant returned to his usual employment on January 13, 1976. He worked the same number of hours as before his injury and received the

same hourly wages until September 22, 1977.[3] At time the Claimant was experiencing pain and sought medical attention from Dr. Newman, Dr. Hebert, Dr. Sinclair, and finally Dr. Correa of the Tulane Medical Center. The Claimant testified that when he returned to work for Progress Marine at the beginning of December 1977, he was placed in a light duty position because of his disability. The Claimant stated that he received the same hourly wages as he had previously, but that he was guaranteed less hours per week. Despite the Claimant's testimony, the Claimant's payroll stubs which were submitted into evidence indicate that the Claimant was earning approximately the same amount when he returned to work in December 1977 as he had been earning previously. The Claimant continued working for Progress Marine until he was laid off September 5, 1978. There is nothing in the record to indicate that the Claimant's actual earnings up until September 5, 1978, did not fairly represent his earning capacity. Therefore, I find that the Claimant's earning capacity after the injury until September 5, 1978 was the same as at the time of the injury. As a result, he suffered no loss of income until September 5, 1978, except for the periods when he was temporarily totally disabled from December 16, 1975 until Janaury 13, 1976, and September 22, 1977 until December 1, 1977. The Claimant testified that a few weeks before he was actually laid off, his Employer had attempted to fire him because of his disability, but had told him to return to work since they could not fire him for his disability. The Claimant testified that he believed his employment with Progress Marine was terminated on September 5, 1978 due to his disability, although his Employer indicated to the Claimant at that time that they had too many employees and needed to let

[3] The insurance report by Mr. Buras indicates that September 22, 1977, is when the Claimant began losing time from his employment with Progress Marine.

some go (Tr. 34). The Employer offered no evidence to dispute the Claimant's allegation that he lost his job because of his disability. I find the Claimant to be credible, and I therefore find that the Claimant's employment with Progress Marine was terminated because of his disability which resulted from his injury on November 24, 1975. The parties stipulated at the hearing that at the time the Claimant left Progress Marine, he was capable of securing employment paying minimum wage (Tr. 135). Therefore, I find the Claimant's earning capacity as of September 5, 1978 to be $106.00 per week.[4] Claimant's permanent partial disability benefits shall be paid accordingly. In computing the Claimant's benefits, his earning capacity shall be adjusted to reflect the increases in minimum wage since 1978. This matter can be handled by the Deputy Commissioner.

Employer paid compensation benefits for temporary total disability from December 16, 1975 to January 13, 1976 at a rate of $185.50 per week. This was an underpayment, as the compensation rate during that period for temporary total disability should have been $264.99, which is 66-2/3 percent of the average weekly wage of $397.48. Accordingly, Employer is liable for the unpaid amount. Additionally, the Employer failed to pay benefits to the Claimant for the time during which he was unable to work due to his injury from September 22, 1977 until December 1, 1977. Therefore, the Employer is liable for temporary total benefits from September 22, 1977 to December 1, 1977.

The Benefits Review Board decided the issue of Claimant's past medical expenses, but the Employer/Carrier remains liable for reasonable future medical care and

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[4] This is based on 40 hours per week at $2.65 per hour, which is the minimum wage which was in effect in 1978.

treatment related to the Claimant's injury of November 24, 1975.

Interest is assessed on past due benefits to ensure that a claimant receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in part sub nom; Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). To ensure uniformity under the Act, the Benefits Review Board has adopted the interest rate used by the U.S. District Courts under 28 U.S.C. §1961 (1982). This has been followed in *Grant v. Portland Stevedoring Co.*, 17 BRBS 20 (1985). The statute, the Federal Courts Improvement Act, provides:

> [a] . . . [S]uch interest shall be calculated from the date of the entry of the judgment at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the Court shall distribute notice of that rate and any changes in it to all federal judges.

Interest on past due benefits shall be computed on the foregoing basis. *Grant v. Portland Stevedoring Co., supra.*

Claimant's attorney, having successfully represented him herein, is entitled to an attorney's fee to be assessed against the Employer. Within 20 days of the receipt of this Order, Claimant's attorney shall file a fully supported and fully itemized application complying with the requirements of Section 28 of the Act and the implementing regulations concerning those necessary and reasonable services rendered and costs necessarily incurred

after referral of this proceeding to the Office of Administrative Law Judges. A copy of the application must be served on opposing counsel who shall then have 10 days to respond with objections thereto.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I make the following compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. Interest as hereinafter provided in the Order is applicable to all past due weekly installments of compensation.

ORDER

Therefore, it is the ORDER of the Administrative Law Judge that:

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability commencing December 16, 1975 through Janaury 13, 1976 and commencing September 22, 1977 through December 1, 1977 based on an average weekly wage of $397.48, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Employer/Carrier shall pay to the Claimant compensation for permanent partial disability in accordance with Section 8(c)(21) of the Act, based upon 66-2/3% of the difference between Claimant's average weekly wages of $397.48 at the time of injury and his post-injury wage earning capacity of $106.00 per week commencing September 5, 1978, and continuing thereafter, excluding the period from September 22, 1977 until December 1, 1977, with the Claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage.

3. Employer/Carrier shall receive credit for all compensation previously paid to Claimant for his work-related injury of November 24, 1975.

4. Employer/Carrier shall continue to furnish such reasonable and necessary medical care and treatment as the Claimant's work-related injury of November 24, 1975, may require.

5. Employer/Carrier shall pay to the Claimant interest in accordance with 28 U.S.C. §1961 on all past due benefits outstanding.

6. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully supported fee application, a copy of which shall be sent to opposing counsel who shall then have 10 days to respond with objections thereto.

/s/ Parlen L. McKenna
PARLEN L. MCKENNA
Administrative Law Judge

Dated: NOV 30 1987
Metairie, Louisiana

PLM:kw
K/76

CERTIFICATE OF FILING AND SERVICE

I certify that on **DEC 02 1987** the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Fred Quave, Rte. 2, Box 93 B, Bogalusa, LA 70427

Claimant

Progress Marine, Inc.

Employer

American Int'l. Adjustment Co., P. O. Box 30707, New Orleans, LA 70190

Insurance Carrier

Christopher Siegrist, P. O. Box 6062, Houma, LA 70361

Attorney for Claimant

James Lambert, Esq., P. O. Box 3527, Lafayette, LA 70402

Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge *Parlen L. McKenna* , Office of the Administrative Law Judges, U.S. Department of Labor, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard, Metairie, Louisiana 70005

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX B

U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs
Seventh Compensation District

. . . . . .

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act

FRED RAY QUAVE
Claimant

VS.

PROGRESS MARINE
Employer

AMERICAN HOME INSURANCE COMPANY
c/o AMERICAN INTERNATIONAL ADJUSTING CO.
Insurance Carrier

SUPPLEMENTAL COMPENSATION ORDER DECLARING DEFAULT Section 14(f) (33 USC 918a)

OWCP NO.: 7-38334
CASE NO.: 81 LHC-876

. . . . . .

No hearing having been held or deemed necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That this office is with jurisdiction to consider the claimant's application for enforcement of the provisions of 33 USC 914(f). See *Tidelands Marine v. Patterson*, 719, F.

2d 126, (5th Cir. 1983); *Lauzon v. Strachan Shipping Co.*, 782 F. 2d 1217 (5th Cir. 1985);

2. That on December 2, 1987, the Decision and Order of the Honorable Parlen L. McKenna, Administrative Law Judge, was filed in the office of the Deputy Commissioner; said Decision and Order is incorporated herein by reference in its entirety;

3. That the payment of compensation was payable within ten days of the filing of this Decision and Order as required by 33 USC 914(f);

4. That the employer/carrier filed a Motion to Stay Payments with the Benefits Review Board. Said Motion was denied on December 1, 1987 by the Benefits Review Board. This Order is incorporated herein by reference.

5. The parties have stipulated to the facts surrounding the delivery of compensation to the claimant (Order of Remand, filed October 25, 1988). This Order is incorporated herein by reference. Compensation was paid to the claimant on December 15, 1987, in the amount of $90,002.47, having been deposited in the mail on December 11, 1987, picked up by the U.S. Postal Service on December 14, 1987, and delivered to the claimant on the 15th of December, 1987.

6. Compensation was due pursuant to the Decision and Order of Parlen L. McKenna filed December 2, 1987, as follows:

Temporary Total Disability

12/16/75 through 1/13/76	4 1/7 weeks @ $264.99	=	$ 1,097.82
9/22/77 through 12/1/77	10 1/7 weeks @ $264.99	=	$ 2,687.76
	TOTAL		$ 3,785.58

Credit Temporary Total Disabilty		
12/16/75 through 1/13/76 4 1/7 weeks @ $185.50	=	$ -768.50
(order, P. 2)		
		$ 3,017.08
Permanent Partial Disability		
9/5/78 through 12/14/87 484 weeks @ $194.32	=	$94,050.88
Unpaid temporary total disability		+3,017.08
Total due pursuant to Order		$97,067.96
Amount paid (Dec. 15, 1987)		-90,002.47
Underpayment		$ 7,065.49

7. Based upon the foregoing the employer/carrier is found to be in default in the amount of $7,065.49.

8. Additionally, the employer/carrier having failed to pay compensation as required by 33 USC 914(f) on the sum of $97,067.96, owe to the claimant additional compensation in the amount of $19,413.59 (20% of $97,067.96).

9. Interest for temporary total disability for the period 12/2/87 through 12/14/87, is due in the amount of $1,620.30, and for permanent partial disability from 9/5/78 through 12/14/87 in the amount of $9,673.33.

Based on the foregoing Findings of Fact the Deputy Commissioner makes the following

ORDER

The employer/carrier are declared in default of payments due pursuant to the Decision and Order filed in the office of the Deputy Commissioner on December 2, 1987. The amount of the default is found to be in the sum of $7,065.49.

Having failed to timely pay compensation as re-

quired by 33 USC 914(f) the employer/carrier shall pay to the claimant the sum of $19,413.59, plus interest in the amount of $11,293.63

Given by my hand and filed at New Orleans, Louisiana, this 22nd day of March, 1989

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on March 22, 1989 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Fred Quave, Rte. 2, Box 93 B, Bogalusa, LA 70427

(Claimant)

Progress Marine, P. O. Box 2548, Morgan City, LA 70380

(Employer)

American International Adjusting Co., P. O. Box 30707, New Orleans, LA 70190

(Insurance Carrier)

Joseph Weigand, Esq., P. O. Box 6062, Houma, LA 70361N/A

(Counsel for Claimant)

Lance S. Ostendorf, Esq., 643 Magazine St., New Orleans, LA 70130-3477

(Counsel for Employer/Carrier)

Honorable Richard D. Mills, Office of Administrative Law Judges, Ste 530, Heritage Plaza, 111 Veterans Memorial Boulevard, Metairie, Louisiana 70005

/s/ Donnette S. Glenn

DONNETTE S. GLENN
Deputy Commissioner
Seventh Compensation District

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Sep 12 89

FRED QUAVE	MISC. ACTION
VERSUS	NO. 2823
PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY	SECTION "A"

JUDGMENT

Considering the written Order of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that the motion of the defendants Progress Marine and American Home Assurance Company c/o American International Adjusting Company to dismiss plaintiff's application for entry of the deputy commissioner's March 22, 1989 supplemental compensation order is granted.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the defendants pay the plaintiff interest at the rate prescribed by the Administrative Law Judge for the period from December 2, 1987 to December 14, 1987, with defendants overpayment of disability benefits to be credited toward the amount of interest owed.

New Orleans, Louisiana, this 11th day of September, 1989.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY SEP 12 1989

MINUTE ENTRY
SCHWARTZ, J.
SEPTEMBER 8, 1989

Filed
Sep 8 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY c/o AMERICAN INTERNATIONAL ADJUSTING COMPANY — SECTION "A"

On May 5, 1989, plaintiff Fred Quave ("Quave") filed an "Application for Entry of Judgment Pursuant to United States Code 33 Section 918," seeking to enforce a "Supplemental Compensation Order Declaring Default" issued by Deputy Commissioner Donnette S. Glenn on March 22, 1989. Shortly thereafter, defendants Progress Marine, Inc. ("Progress Marine"), plaintiff's employer, and American Home Assurance Company c/o American International Adjusting Company ("American Home"), Progress Marine's insurer, filed a Motion to Dismiss plaintiff's Application for Entry of Judgment. Following oral argument and the submission of additional memoranda, defendants' motion to dismiss was taken under submission. For the following reasons, defendants' motion to dismiss is hereby GRANTED.

BACKGROUND

Plaintiff is a claimant seeking Longshore and Harbor Workers' Compensation Act benefits from his employer and his employer's insurance carrier. On December 2, 1987, an Administrative Law Judge ("ALJ") issued a "Decision and Order on Remand," pursuant to which the ALJ deter-

DATE OF ENTRY SEP 11 1989

mined that plaintiff was entitled to temporary total disability benefits for a specified time period, as well as permanent partial disability benefits for a time period extending from 1978 to 1987. However, the ALJ did not calculate the specific amount of plaintiff's permanent partial disability benefits.[1] Instead, the ALJ directed the deputy commissioner to make the appropriate calculations based upon "the difference between Claimant's average weekly wages of $397.48 at the time of injury and his post-injury wage earning capacity of $106.00 per week [minimum wage] commencing September 5, 1978, and continuing thereafter, ..." The ALJ further directed the deputy commissioner to adjust the claimant's wage earning capacity to "reflect the increases in minimum wage since 1978."

On December 11, 1987, despite the deputy commissioner's failure to calculate the precise amount of plaintiff's benefits, defendants mailed plaintiff a check in the amount of $90,002.47, which reflected the amount which defendants estimated plaintiff's temporary total and permanent partial disability benefits to be. Subsequently, plaintiff filed with the Office of Workers' Compensation Programs, Seventh Compensation District, an application for a "20% penalty" plus the difference between what plaintiff estimated his benefits to be and what defendants estimated plaintiff's benefits to be. In a March 22, 1989 "Supplemental Compensation Order Declaring Default," the deputy commissioner made the following calculations:

(1) That plaintiff's temporary total disability benefits were $3,017.08; and,

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[1] The ALJ also failed to calculate the specific amount of plaintiff's temporary total disability payments; however, defendants do not allege that the amount of plaintiff's temporary total disability benefits, as calculated by the deputy commissioner, was incorrect.

(2) That plaintiff's permanent partial disability benefits were $97,067.96.

Based on these calculations the deputy commissioner determined that defendants owed plaintiff $7,065.49 in permanent partial disability benefits. The deputy commissioner further determined that pursuant to the provisions of 33 U.S.C. § 914(f), defendants owed plaintiff $19,413.59 (20% of $97,067.96) as a penalty for untimely payment of plaintiff's permanent partial benefits; and that defendants owed plaintiff interest in the amount of $11,293.63.

The Court's review of this matter, pursuant to the provisions of 33 U.S.C. §918, is limited. A district court may review a deputy commissioner's supplemental compensation order for the purpose of determining whether the order is "in accordance with law and accurate as to the amount in default...." *Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 864 (5th Cir. 1983). Having undertaken such a review, the Court finds that the deputy commissioner's supplemental compensation order is inaccurate as to the amount in default.

As stated earlier, the ALJ ordered that plaintiff was entitled to compensation for permanent partial disability "with the claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage." However, in her supplemental compensation order declaring default, the deputy commissioner used the 1978 minimum wage ($106.00 per week; 40 hours @ $2.65 per hour) as a constant for the calculation of the permanent partial disability award from 1978 to 1987. Defendants submit, and the Court agrees, that the deputy commissioner should have adjusted the permanent partial disability rate over the course of 484 weeks to reflect the increase in minimum wage from 1978 to 1987. As referenced in the report of Kenneth J. Boudreaux, Ph.D. (a copy of which is annexed

hereto), the minimum wage rates increased as follows:

1/1/78 through 12/31/78	$2.65 per hour
1/1/79 through 12/31/79	2.90 per hour
1/1/80 through 12/31/80	3.10 per hour
1/1/81 through 12/31/81	3.35 per hour

Using the proper minimum wage rates, Professor Boudreaux calculates that plaintiff's temporary total and permanent partial disability compensation totals $89,320.86. Having determined that Professor Boudreaux's calculations are correct, the Court hereby adopts said calculations and finds that plaintiff's temporary total and permanent partial benefits equal $89,320.86. Since defendants delivered to plaintiff a check in the amount of $90,002.47, a sum greater than the amount actually owed, the deputy commissioner clearly erred in assessing against defendants an additional $7,065.49 in permanent partial disability benefits.

It is equally clear that the deputy commissioner erred in assessing against defendants the sum of $19,413.59 as a penalty pursuant to the provisions of 33 U.S.C. §914(f). 33 U.S.C. § 914(f) provides, in pertinent part, as follows:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation....

In the instant action, it is undisputed that plaintiff's permanent partial disability compensation became due on Wednesday, December 2, 1987, the date on which the ALJ's Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office. It is also

undisputed that plaintiff received his compensation payment from defendants on Tuesday, December 15, 1987. It is equally clear, pursuant to the provisions of § 914(f), that defendants were required to pay plaintiff his compensation within ten (10) days from December 2, 1987, or be subject to a penalty in the amount of 20% of the compensation due. The dispute arises with regard to when this ten (10) day time limit expired. Specifically, whether December 15, 1987, the date on which plaintiff received his compensation payment, is or is not within this ten (10) day time limitation. For the following reasons, the Court finds that Tuesday, December 15, 1987, is within the ten (10) day time limitation.

Federal Rule of Civil Procedure 6(a) provides, in pertinent part, that when a period of time prescribed by statute is less than eleven (11) days, intermediate Saturdays and Sundays shall be excluded in computing the applicable time limitation. The Federal Rules of Civil Procedure are made applicable to the Longshore and Harbor Workers' Act by F.R.C.P. 81 (a)(6). Rule 81(a)(6) provides that the Federal Rules of Civil Procedure "apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act ... except to the extent that matters of procedure are provided for in that Act...." There is no provision in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et. seq.*, which provides a method by which the ten (10) day time limitation in 33 U.S.C. § 914(f) should be calculated. Accordingly, the provisions of Rule 6(a) become the applicable method by which the ten (10) day time limitation is to be calculated.[2] When the intermediate Saturdays and Sundays are excluded from

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[2] *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1163 for a good discussion regarding the benefits of applying F.R.C.P. 6 to time limitations contained in federal statutes such as the Longshore and Harbor Workers' Compensation Act.

the time period of Wednesday, December 2, 1987 (the date plaintiff's compensation payment became due) to Tuesday, December 15, 1987 (the date plaintiff received his compensation payment), it becomes clear that plaintiff timely received his payment.[3]

In arguing that Rule 6(a) is not applicable to the pertinent ten (10) day time limitation, plaintiff relies on a series of administrative law judge and benefit review board decisions wherein the ten (10) day limit was calculated without excluding intermediate Saturdays and Sundays. However, all of these decisions were decided prior to 1985. Prior to 1985, the pertinent provision of Rule 6(a) provided that intermediate Saturdays and Sundays could be excluded only if the time limitation was less than seven (7) days. Thus, contrary to plaintiff's assertion, intermediate Saturdays and Sundays were included in these pre-1985 time computations not because Rule 6(a), as a general rule, is inapplicable to Section 914(f) of the Longshore and Harbor Workers' Act; but instead, simply because the time limitation prescribed by § 914(f) was too long to fall under the pre-1985 version of Rule 6(a).

Plaintiff also relies on *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217 (5th Cir. 1985), for the proposition that the Federal Rules of Civil Procedure in general (and Rule 6(a) in particular) are inapplicable to the time limitation of § 914(f). However, plaintiff's reliance is misplaced. In *Lauzon*, the Fifth Circuit specifically declined to reach the issue regarding the "general applicability of the Federal Rules of Civil Procedure to section 914(f) assessments...." *Lauzon*, 782 F.2d at 1220. Instead, the Court determined that even if the Rules of Civil Procedure applied, Rule 6(e) (the pertinent rule which the defendant/employer sought to

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[3] The ten (10) day time limit, excluding intermediate Saturdays and Sundays, expired on Wednesday, December 16, 1987.

apply) did not afford defendant relief since its provisions apply only when a party is required to do some act following "*service* of notice or other paper upon him. [Emphasis original.]" § 914(f) requires a party to do some act (specifically, to pay compensation benefits) following "*filing* of the compensation order with the deputy commissioner. [Emphasis original.]" As such, "Rule 6(e) is inapplicable." *Id.*

With regard to interest payments, the ALJ properly ordered that defendants pay plaintiff "interest in accordance with 28 U.S.C. § 1961 on all past due benefits outstanding." Since plaintiff's benefits became due on December 2, 1987 and plaintiff did not receive those payments until December 14, 1987, defendants owe plaintiff interest, at the rate prescribed by the ALJ, for the period from December 2, 1987 to December 14, 1987.[4] Accordingly;

IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's application for entry of the deputy commissioner's March 22, 1989 supplemental compensation order is GRANTED.

IT IS FURTHER ORDERED that defendants pay plaintiff interest, as directed above, with defendants' overpayment of disability benefits to be credited toward the amount of interest owed.

The Clerk of Court is hereby directed to enter Judgment in accordance with the above orders.

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[4] In calculating the amount of interest owed, defendants are to receive credit for their overpayment of disability benefits.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Oct 26 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY — SECTION "A"

AMENDED JUDGMENT

Pursuant to the Court's Minute Entry dated October 25, 1989, the final paragraph of the Judgment entered herein on September 12, 1989 be and it is hereby amended to read as follows:

IT IS ORDERED, ADJUDGED, AND DECREED, that defendants owe plaintiff interest at the rate provided for in 28 USC 1961 and for the period from December 2, 1977 through December 14, 1987, on $3,017.08 in temporary total benefits.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that defendants owe plaintiff interest at the rate provided for in 28 USC 1961 and for the period from September 5, 1978 through December 14, 1987, on $86,303.78 in permanent partial benefits.

New Orleans, Louisiana, this 26th day of October, 1989.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY OCT 26 1989

MINUTE ENTRY
SCHWARTZ, J.
OCTOBER 25, 1989

Filed
Oct 25 89

FRED QUAVE — MISC. ACTION

VERSUS — NO. 2823

PROGRESS MARINE AND AMERICAN HOME ASSURANCE COMPANY c/o AMERICAN INTERNATIONAL ADJUSTING COMPANY — SECTION "A"

This matter is before the Court on the motion of plaintiff Fred Quave for new trial. Said motion, scheduled for oral argument on Wednesday, October 25, 1989, was taken on briefs without oral argument.

Plaintiff complains that the Court was in error in ordering, pursuant to its September 8, 1989 Minute Entry, that defendants pay plaintiff "interest, at the rate prescribed by the ALJ [Administrative Law Judge], for the period of December 2, 1987 [the date the ALJ's order was entered] to December 14, 1987 [the date plaintiff received defendants' compensation payment]." Plaintiff argues that the Court should have awarded interest for the period "from 1977 to 1987. . . ."

In determining the period over which interest was owed, the Court primarily relied upon the ALJ's December 2, 1987 "Decision and Order on Remand," as well as the Deputy Commissioner's March 22, 1989 "Supplemental Compensation Order Declaring Default." Specifically, the ALJ provided in his decision that the "Employer/Carrier shall pay to the Claimant interest in accordance with 28

U.S.C. §1961 on all past due benefits outstanding;"[1] (See p. 12 of the ALJ's decision), and the Deputy Commissioner provided in her supplemental order that defendants are to pay "[i]nterest for temporary total disability for the period *12/2/87 through 12/14/87*. . . . [Emphasis added.]" (See p. 2 of the Deputy Commissioner's supplemental order.) Unfortunately, the Court's reliance was misplaced in that the above portion of the ALJ's decision was misleading and the above portion of the Deputy Commissioner's supplemental order was erroneous due to a typographical error.

The Deputy Commissioner, in determining that interest was owed for the period 12/2/87 through 12/14/87, relied on a "worksheet" prepared by Claims Examiner R.F. Ahern "outlining the sums due pursuant to the Decision and Order filed in this office on December 2, 1987." (Copy of Mr. Ahern's worksheet, along with his transmittal correspondence, is attached hereto.) However, in contrast to the Deputy Commissioner's supplemental order, the Claims Examiner's worksheet reflected that interest was due for the period of "12/2/77 -12/14/87." Thus, a typographical error was made in transposing the Claims Examiner's calculations to the Deputy Commissioner's supplemental order.

The ALJ, in providing that plaintiff shall receive "interest in accordance with 28 U.S.C. §1961. . ." actually meant that plaintiff shall receive interest in accordance with that portion of 28 U.S.C. §1961 which provides that interest shall be calculated at a "rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the

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[1] 28 U.S.C. §1961 provides, in pertinent part, that "interest shall be calculated *from the date of the entry of the judgment*, at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the judgment. [Emphasis added.]"

judgment." However, contrary to another portion of 28 U.S.C. §1961 which provides that "interest shall be calculated from the date of the entry of the judgment," the interest awarded in connection with benefits under the Longshore and Harbor Workers' Compensation Act, is calculated from the date these benefits become due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *vacated on other grounds, Newport News Shipbldg., Etc. v. Director, Wkrs. Comp., Etc.*, 594 F.2d 986, 987 (4th Cir.1979). This is true despite the fact that there may be delays in processing a plaintiff/claimant's benefit claims which are beyond the defendant/employer's control. *Id.* The rationale for this rule is that the defendant/employer improperly had the use of money which rightfully belonged to the plaintiff/claimant during the pertinent time period. *Id.*

In the instant case, the ALJ determined that plaintiff's temporary total disability benefits became due on December 2, 1977; and that plaintiff's permanent partial disability benefits became due on September 5, 1978. Accordingly;

IT IS HEREBY ORDERED that plaintiff's motion is GRANTED to the extent that plaintiff seeks the Court to amend its September 8, 1989 Minute Entry to provide that defendants owe plaintiff interest at the rate provided for in 28 U.S.C. §1961 and for the period from December 2, 1977 through December 14, 1987, on $3,017.08 in temporary total benefits; and that defendants owe plaintiff interest at the rate provided for in 28 U.S.C. §1961 and for the period from September 5, 1978 through December 14, 1987, on $86,303.78 in permanent partial benefits. To the extent that plaintiff, pursuant to said motion, seeks any greater relief, plaintiff's motion is DENIED. The clerk of Court is hereby directed to amend the Judgment entered in the above captioned matter on September 12, 1989, in accordance herewith.

APPENDIX E

Fred QUAVE, Claimant,
Plaintiff-Appellant,
Cross-Appellee,

v.

PROGRESS MARINE, Employer, and
American Home Assurance Co., c/o
American International Adjusting Co.,
Insurance Carrier, Defendants-Apellees,
Cross-Appellants.

No. 89-3779.

United States Court of Appeals,

Fifth Circuit.

Sept. 24, 1990

Appeals were taken from judgment of the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., in action to recover benefits under Longshore and Harbor Workers' Compensation Act (LHWCA). The Court of Appeals, Duhe', Circuit Judge, held that: (1) district court properly excluded intermediate Saturdays and Sundays when determining whether payment of compensation benefits was timely, and (2) interest could be added to past-due compensation even though there was no statutory provision under LHWCA authorizing such award.

Defendants' appeal dismissed; affirmed.

See also 721 F.Supp. 784.

Appeals from the United States District Court For the Eastern District of Louisiana.

Before REAVLEY, DUHE' and WIENER, Circuit Judges.

DUHE', Circuit Judge.

Plaintiff appeals the district court's reversal of the Deputy Commissioner's award of statutory penalties and original defendants appeal the district court's determination that plaintiff was entitled to interest and to attorney's fees. We dismiss defendants appeal of the award of attorney's fees for lack of jurisdiction and affirm the remainder.

Fred Quave filed a claim seeking Longshore and Harbor Worker's Compensation benefits from his employer, Progress Marine, Inc., and its insurer, American Home Assurance Company. On December 2, 1987, the Administrative Law Judge (ALJ) ordered the payment of compensation benefits to Quave. The ALJ did not calculate the amount of these benefits but directed the Deputy Commissioner to do so. The Deputy Commissioner did not make that determination. Defendant made an estimation of plaintiff's benefits and mailed a check for $90,002.47 to claimant on December 11, 1987.

Upon receipt of the check plaintiff filed a motion for more compensation on the grounds that the defendants had underestimated the required payment and for an assessment of a 20% penalty pursuant to 33 U.S.C. § 914(f) for untimely payment. The Deputy Commissioner determined that the defendant's owed plaintiff $7,065.49 in additional benefits, $19,413.59 in penalties under 33 U.S.C. § 914(f), and $11,293.63 in interest. Plaintiff then sought to enforce this supplemental compensation order in district court pursuant to 33 U.S.C § 918. The district court

concluded that the Deputy Commissioner erred in awarding the plaintiff additional benefits and in assessing a penalty pursuant to 33 U.S.C.§ 914(f). The court found that defendants had actually made an overpayment of compensation to the plaintiff and ordered that such overpayment be credited against the post-judgment interest award. The district court later amended its judgment to include an award of pre-judgment interest. Then defendants' counsel filed a motion for attorney's fees. In the subsequent weeks, both plaintiff and defendants filed notices of appeal. Several weeks after these notices were filed, the district court granted plaintiff's motion for attorney's fees.

Timeliness of Payment

[1] Quave contends that the district court erred by finding the payment of compensation benefits to be timely. All parties agree that pursuant to 33 U.S.C § 914(f) "[i]f any compensation . . . is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty per centum[.]" It is undisputed that Quave's compensation benefits became due on December 2, 1987 the date the ALJ's Decision and Order was filed in the Office of the Deputy Commissioner. It is also undisputed that Quave received his compensation payment on December 15, 1987. The district court, applying Fed.R.Civ.P 6(a)[1] excluded the intermediate Saturdays and Sundays in computing the applicable time limit. In do-

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[1] Fed.R.Civ.P. 6(a) provides in part:

In computing any period of time prescribed or allowed by these rules . . . the day of the act . . . from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday[.] . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

ing so it found that the payment received on December 15, 1987 was timely. Quave argues that 29 CFR § 18.4 governs the computation of the ten day limitation period rather than Fed.R.Civ.P. 6(a). 29 CFR § 18.4 does not exclude weekends,[2] and accordingly, the 20% penalty provision of 33 U.S.C. § 914(f) would be appropriate. In *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217 (5th Cir.1985) we reserved the issue of whether the Federal Rules of Civil Procedure apply to a § 914(f) penalty assessment. We did note, however, that "[t]he Federal Rules of Civil Procedure 'apply to proceedings for enforcement or review of compensation orders under . . . U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in' " the LHWCA. *Id.* at 1219, citing, Fed.R.Civ.P. 81(a)(6) (emphasis added).[3] 29 CFR § 18.4 is not within the LHWCA.

"Although § 914 is not mentioned specifically in Rule 81(a)(6), this Court has held that [an order based upon] 'a "Section [9]14(f) assessment," . . . [is] a "supplementary order declaring the amount of the default" within the meaning of Section [9]18(a) of the LHWCA.' " *Lauzon*, 782 F.2d at 1219, *citing Tidelands Marine Service v. Patterson*, 719 F.2d 126, 128 n. 3 (5th Cir.1983). Coupling the plain language of Fed.R.Civ.P. 81(a)(6) with this Court's reason-

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[2] 29 CFR § 18.4 states in part: "[w]hen the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation."

[3] In *Jourdan v. Equitable Equipment Co.*, 889 F.2d 637 (5th Cir.1989) we again recognized that the Rules of Civil Procedure apply to LHWCA matters except to the extent that matters of procedure are provided for in that Act. However, we held that service with a summons and complaint as required by Fed. R.Civ.P. 4 was inapplicable to LHWCA enforcement proceedings because proper enforcement procedures are provided for in the Act. *Id.* at 639.

ing in *Tidelands*[4] we conclude that the district court's determination that Fed.R.Civ.P. 6(a) governs was proper.

Award of Interest

[2] Next defendants argue that the addition of interest to past due compensation payments should not be allowed because there is no statutory provision under the LHWCA authorizing such an award. They concede that this Court has held to the contrary in *Strachan Shipping Co. v. Wedemeyer,* 452 F.2d 1225 (5th Cir.1971), but contend that *Strachan* is not controlling here because it relied upon a statutory provision, 33 U.S.C. § 914(m) that has been repealed. Defendants' contention is without merit. The *Strachan* court did not rely on § 914(m). Indeed the court rejected the very argument defendants now advance and reasoned that interest could be awarded under the LHWCA despite the absence of express statutory authorization. *Id.* at 1228-30.

Award of Attorney's Fees

[3] We do not here need to decide whether the district court erred in awarding attorney's fees to claimant's counsel, because the notice of appeal filed on that judgment is insufficient. The appeal before us was filed several weeks before the judgment awarding attorney's fees was entered. Fed.R.App.P. 3(c) states that "[t]he notice of appeal shall specify the party or parties taking the appeal; [and] shall designate the judgment, order or part thereof appealed from[.]

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[4] Referring to an order finding defendants in default for more than 30 days in the payment of additional compensation under § 914(f) we viewed, for jurisdictional purposes, the order as a § 918(a) compensation default order. "That which looks like a duck, walks like a duck, and quacks like a duck, will be treated as a duck even though some would insist upon calling it a chicken." *Tidelands,* 719 F.2d at 128 n.3.

The notices of appeal filed by appellants and appellees here designated only the district court's judgment of October 25, 1989. That judgment makes no reference to attorney's fees. Accordingly, we DISMISS defendants' appeal of the attorney's fees award for lack of jurisdiction and AFFIRM the remainder.

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 89-3779

FRED QUAVE,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

PROGRESS MARINE,
Employer

and

AMERICAN HOME ASSURANCE COMPANY,
c/o AMERICAN INTERNATIONAL
ADJUSTING COMPANY,
INSURANCE CARRIER,
Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(November 14, 1990)

(Opinion September 24, 1990, 5th Cir., 1990, ____F.2d____)
Before REAVLEY, DUHE and WIENER, Circuit Judges.

DUHE', Circuit Judge.

In our original opinion we declined to decide whether the district court erred in awarding attorney's fees to claimant's counsel because we found no separate notice of appeal from that judgment and none was called to our attention. In fact, however, there was a second notice of appeal later filed which appropriately gave us jurisdiction. That notice of appeal was inadvertently overlooked and we now address the issue previously dismissed.

A full recitation of the facts is not necessary as they have been set out in detail previously. This case involved an action to recover benefits under the Longshore and Habor Worker's Compensation Act (LHWCA). Claimant's counsel submitted an application for attorney's fees to the district court for services rendered in the enforcement proceeding. The district court, in a minute entry, granted partial award for attorney's fees equaling $600.00 and disallowed the remainder.

Original defendants, Progress Marine, Inc. and its insurer, American Home Assurance Company, argue that any award of attorney's fees was improper because claimant's counsel failed to obtain any additional "compensation."[1] He did, however, succeed in recovering

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[1] 33 U.S.C. § 928(a) reads in pertinent part:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee. . . .

an award of prejudgment interest. Defendant's argue that an award of interest is not equivalent to an award of compensation, yet fail to cite any authority for this proposition.[2] However, defendants do cite *Ayers Steamship Co. v. Bryant*, 544 F.2d 812 (5th Cir. 1977) which stated that "[a]ttorney's fees can only be assessed against the employer . . . when the claimant has successfully claimed coverage which the employer has either totally or partially denied." *Id.* at 813-14. Quave claimed interest, defendants denied such coverage and ultimately Quave was successful on his claim, at least in part. Accordingly, the petition for rehearing is granted. The previously assessed award of attorney's fees was proper and we AFFIRM.

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[2] In other context, however, interest has been considered as part of just compensation. In *Sinclair Refining Company v. S. S. Green Island*, 426 F.2d 260, 262 (5th Cir. 1970) we noted that the general rule in admiralty is that those injured by tortuous collision are entitled to interest as a part of just compensation for the wrong done. *See also Complaint of M/V Vulcan*, 553 F.2d 489 (5th Cir. 1977).